

13 Elul 5776
Sept. 16, 2016



Bava Kamma Daf 108

Produced by Rabbi Avrohom Adler, Kollel Boker Beachwood

Daf Notes is currently being dedicated to the neshamot of

Moshe Raphael ben Yehoshua (Morris Stadtmauer) o”h
Tzvi Gershon ben Yoel (Harvey Felsen) o”h

May the studying of the Daf Notes be a zechus for their neshamot and may their souls find peace in Gan Eden and be bound up in the Bond of life

Kefel and Chomesh

Rami bar Chama inquired: [One who claims that the deposit kept by him was stolen, if he swears falsely and witnesses testify that he in fact stole it himself, pays kefel, but is exempt from the “one-fifth” penalty even if he confesses to his guilt.] What is the reason that he is not required to pay the one-fifth penalty? Is it the money that makes one liable for the double payment that exempts him, or is the oath which makes him liable for the double payment that exempts him?

The Gemora explains the precise case where this inquiry is applicable: If an unpaid custodian claimed that it was stolen from him and he swore to that effect, but came afterwards and swore that it was lost, and witnesses testified that his first oath was false (for it was in his possession at that time) and he admitted that the second oath was false, what is the halachah? If it is the money that makes one liable for the double payment that exempts him from the one-fifth penalty, and therefore, here, where he is liable for the kefel, he will be exempt from the one-fifth penalty, or is it the oath which makes him liable for the double payment that exempts him, and here, where the second oath does not make him liable for kefel, it could make him liable for the one-fifth penalty?

Rava said: Let us bring a proof from the following braisa: If a person accuses someone from the street and says, “Where is my ox that you stole?” The person responds, “I did not steal it.” After taking an oath to this effect, witnesses testify that he indeed stole it. He has to pay

kefel. If he admits by himself, he must pay the principle, a fifth and a korban asham. Now here, if witnesses would have testified before his admission, they would have made him liable to pay kefel (even without his oath, for a thief always pays kefel), but nevertheless, when he admits by himself, he pays the one-fifth penalty, but if he would have admitted that he swore falsely after the testimony, he would not be liable for the fifth. Now, if you would think that it is the oath which makes him liable for the double payment that exempts him from paying the fifth, why would he not be required to pay the fifth after witnesses testify? It is not the oath which made him liable to pay kefel (it is the witnesses’ testimony that made him liable)! So let the oath make him liable to pay the fifth!? This would prove that it is the money that makes one liable for the double payment that exempts him from paying the fifth (and since he is liable to pay kefel, he is exempt from paying the fifth).

Ravina inquired: What would be the halachah as to the fifth penalty and the double payment to be borne by two persons respectively? He explains where this would be applicable: If an ox was given over to two people and both claimed that it was stolen, but while one of them confirmed it by an oath and subsequently confessed that he swore falsely, the other one confirmed it by an oath and witnesses testified that he swore falsely. Now, what is the halachah? Shall we say that it was only in the case of one person that the Torah was particular that he should not pay both the fifth and the double payment, so that in this case, where two people are involved, one should make the double payment and the other should pay the



fifth, or shall it perhaps be said that it was with regards to one sum of money that the Torah was particular that both payments should not be made, and in this case also, it is one sum of money? The *Gemora* leaves this inquiry unresolved.

Rav Pappa inquired: What would be the *halachah* as to the payment of two-fifths or two double payments to be borne by the same person? He explains where this would be applicable: If the custodian first claimed that it was lost and after confirming it by an oath confessed that he swore falsely, but afterwards came back and claimed again that it was lost, confirming it by an oath, and then again confessed that he swore falsely, or if he claimed that it was stolen, confirming it by an oath and witnesses testified that he swore falsely, but he afterwards came back and claimed again that it was stolen, confirming it by an oath, and witnesses testified that he swore falsely. Now, what would be the *halachah*? Shall we say that it was only two different types of monetary payments (*such as the fifth and the double payment*) that the Torah forbade to be paid regarding one sum of money, whereas here, the liabilities are of one kind (*and should therefore be paid*), or perhaps it was two payments that the Torah forbade to be paid regarding one sum of money, and here also, the payments are two?

The *Gemora* attempts to resolve this inquiry from the following statement of Rava: It is written: *And its fifths shall he add to it*. The Torah has thus attached numerous fifths to one principal. It could surely be derived from this (*that there can be two fifth payments for the same principle*). (107b – 108a)

Custodian Inquiries

If the owner had claimed his deposit from the custodian, who, though he initially denied the claim and swore to that effect, nevertheless paid for it (*although he was exempt*), and then the actual thief was identified, to

whom should the double payment go (*for if he would have paid without taking the oath, he would have acquired the rights to the double payment*)?

Abaye said: The *kefel* belongs to the owner of the deposit, but Rava said that it goes to the custodian to whom the deposit was in charge.

The *Gemora* explains their line of reasoning: Abaye said that it should go to the depositor, for since the custodian troubled the owner with an oath, he does not sell him the *kefel* payment. But Rava said that it would go to the custodian, for since after all, he paid him, the double payment was surely transferred to him.

They disagree on the implication from the following *Mishna*: If one person deposited with another an animal or utensils which were subsequently stolen or lost, if the custodian paid and did not wish to take an oath, for behold it has been stated that an unpaid custodian can by means of an oath discharge his liability. If the actual thief was found, he pays the double payment, or, if he had already slaughtered the animal or sold it, he pays the fourfold or fivefold payment. To whom should he pay? He pays to him with whom the deposit was in charge. But if the custodian took an oath and did not want to pay and then the thief was found, he pays the double payment, or, where he already slaughtered the animal or sold it, he pays the fourfold or fivefold payment. To whom should he pay? He pays to the owner of the deposit. Now, Abaye infers his view from the commencing clause, whereas Rava deduces his ruling from the concluding clause. Abaye infers his view from the commencing clause where it was stated: If the custodian paid and did not wish to take an oath. This is so only where he was not willing to swear, but if he did swear, even though he paid, the double payment goes to the owner of the deposit. Rava deduced his ruling from the concluding clause where it was stated: If the custodian took an oath and did not want to pay. This is so only where he was not willing to pay, but



if he did pay, even though he took an oath, the double payment goes to the one with whom the deposit was in charge.

The *Gemora* explains how Abaye and Rava understand the other clause in the *Mishna*.

If the owner had claimed his deposit from the custodian, and he denied it upon oath, and the actual thief was then identified and the custodian demanded payment from him and he confessed the theft, but when the owner of the deposit demanded payment from him, he denied it and witnesses testified that he did steal it, did the thief become exempt from paying the *kefel* through his confession to the custodian, or did the thief not become exempt through his confession to the custodian?

Rava said: If the oath taken by the custodian was true (*that it was stolen and he could not have prevented it from happening*), the thief would become exempt through his confession to the custodian (*for due to his trustworthiness, the owner still wants him to retain him as a custodian, and he can therefore be regarded as a litigant*), but if he swore falsely (*and the owner has no interest in him remaining the custodian*), the thief would not become exempt through his confession to the custodian.

Rava himself inquired: What would be the *halachah* where the custodian was prepared to swear falsely but he was not allowed to do so (*is he regarded as a litigant or not*)? The *Gemora* leaves this inquiry unresolved.

Rav Kahana taught the above discussion in the manner presented. Rav Tavyomei taught it as follows: Rava inquired: What would be the *halachah* where the custodian did swear falsely? The *Gemora* leaves this inquiry unresolved.

If the owner had claimed his deposit from the custodian, who thereupon paid him, and the thief was then identified and when the owner demanded payment from him, he confessed, whereas when the custodian demanded payment from him, he denied it, and witnesses testified that he did steal it, should the thief become exempt from paying the *kefel* through his confession to the owner or not? Shall we maintain that the custodian is entitled to say to the owner, "Since you have received the payment of your deposit, you are removed from this matter," or can the owner say to them, "Just as you did us a favor (*by paying us*), we also are willing to do you the same for you and we are therefore looking for the thief. And just like we took back what belonged to us, you should receive back what belonged to you (*and the owner is still regarded as a litigant; the admission will therefore be a valid one*)!?" The *Gemora* leaves this inquiry unresolved.

It was stated: If the deposit was stolen from a custodian by armed bandits and the thief was identified, Abaye said that if the custodian was unpaid, he has the option of paying the owner and taking the thief to court, or he can take an oath (*so that the owner himself will have to deal with the thief*), whereas if he was a paid custodian, he would be required to take the thief to court and he cannot take an oath to discharge his liability. But Rava said that either way, he would be required to take the thief to court and he cannot take an oath to discharge his liability.

The *Gemora* comments: May we say that Rava differs from the view of Rav Huna bar Avin, for Rav Huna bar Avin sent a ruling that where the deposit was stolen by armed bandits and the thief was identified, if the custodian was unpaid, he had the option of paying the owner and taking the thief to court, or he can take an oath (*so that the owner himself will have to deal with the thief*), whereas if he was a paid custodian, he would be required to take the thief to court and he cannot take an oath to discharge his liability.



Rava could answer that in this last ruling, we are dealing with a case where the paid custodian took the oath before the thief was identified (*and therefore it is not his duty at all to look for the thief*).

The *Gemora* asks: But didn't Rav Huna say: He had the option of paying the owner and taking the thief to court, or he can take an oath? [*Seemingly, he is referring to a case where the custodian did not swear yet!?*]

The *Gemora* answers: What he meant was this: The unpaid custodian has the choice of standing by his oath or he can pay the owner and take the thief to court.

Rabbah Zuti inquired as follows: If the deposit was stolen by an armed bandit and the thief returned it to the house of the custodian, and it then died through the custodian's negligence, what should be the *halachah*? Shall we say that since it was stolen by an armed bandit, the duty of custodianship came to an end, or perhaps since it was returned to him, it has returned to his charge? The *Gemora* leaves this inquiry unresolved. (108a – 108b)

Mishna

A person asks a guardian, "Where is the deposit (*I gave you*)?" The guardian claims it was lost. If he makes him swear and he answers *amen*, and then witnesses testify that the guardian ate it, he must pay its value. If he admitted on his own that he lied, he pays its value plus one fifth and a *korban asham*. A person asks a guardian, "Where is the deposit (*I gave you*)?" The guardian claims it was stolen. If he makes him swear and he answers *amen*, and then witnesses testify that the guardian ate it, he must pay double its value. If he admitted on his own that he lied, he pays its value plus one fifth and a *korban asham*.

If a person stole from his father and swore to him, and then the father died, he pays the principal and the fifth to

the father's sons or to the father's brothers; and if he does not want (*to lose his portion*), or if he does not have, he may borrow (*and pay for the theft to the heirs – for this way, he fulfills the mitzvah of returning that which he stole*), and the creditors come and collect payment (*from his portion, which is his rightful inheritance*).

If one says to his son, "*Konam* that you cannot benefit from me"; if he dies, his son may inherit him (*since the possessions do not belong to the father any longer*). If he said in his vow, "while I am alive and even after I die," he may not inherit him. If he does not have, he may borrow, and the creditors come and collect payment. (108b – 109a)

QUESTIONS AND ANSWERS FROM YESTERDAY'S DAF

to refresh your memory

Q: Does a custodian need to make a partial admission in order to be required to take an oath?

A: The Amoraim argue about this.

Q: Why is a borrower exempt from taking an oath when he completely denies it?

A: It is because we assume that no man would be so insolent to deny his obligation in the face of his creditor.

Q: What are the three oaths placed upon a *shomer*?

A: An oath that he was not negligent, an oath that he did not misappropriate it and an oath that the deposit is no longer in his possession.